In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 504

CHARLES MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 25–26) is reported at 319 F. 2d 740.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1963. A timely petition for rehearing was denied on July 30, 1963 (Pet. 29). On August 23, 1963, Mr. Justice Goldberg granted an extension of time within which to file a petition for a writ of certiorari to and including September 28, 1963. The petition was filed on September 28, 1963. The juris-

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diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony of an accomplice was sufficient to support petitioner's narcotics conviction.

2. Whether the district court properly instructed the jury regarding accomplice testimony.

STATEMENT

A 22-count indictment returned in the United States District Court for the District of Columbia charged petitioner, one Clinton Johnson, and five others[1] with a number of substantive narcotic offenses and conspiracy to violate the narcotic laws, in violation of 21 U.S.C. 174, 26 U.S.C. 4704(a) and 4705(a), and 18 U.S.C. 371 (J.A. 1–10).[2] Johnson pleaded guilty to one substantive count of the indictment and testified for the government. After a jury trial, petitioner was convicted on three counts based on one of the seven sales alleged in the indictment.[3] He was sentenced, as a second offender, to imprisonment for twelve years (J.A. 236–238). On appeal, the conviction was affirmed (Pet. 25–26).

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[1] One of petitioner's co-defendants was Doris L. Gardiner, whose petition for certiorari (No. 638 Misc., this Term) concerns different facts and raises distinguishable questions. Although we have concluded, for this reason, that separate briefs in opposition should be filed in the two cases, both oppositions are being filed contemporaneously.

[2] "J.A." refers to the joint appendix filed on behalf of petitioner and two co-defendants in the court of appeals.

[3] All defendants were acquitted on the conspiracy count. Two of petitioner's co-defendants were acquitted and three convicted. All convictions were affirmed on appeal.

The evidence pertinent to the counts on which petitioner was convicted may be summarized as follows:

On December 21, 1961, undercover Narcotics Agent Herman Scott asked whether Johnson could get "anything" from "Gate" (the name by which petitioner was known). Johnson said that he would try (J.A. 30). Johnson then telephoned petitioner to inquire whether he could purchase a half ounce of heroin. Petitioner replied in the affirmative, saying that he would call Johnson later (J.A. 30). Petitioner called Johnson back and arranged a meeting. At the appointed time, petitioner said that he "placed the heroin over in the bushes," and that Johnson should "go over there and pick it up" (J.A. 31–32). Johnson then picked up some heroin which was under a brown paper bag (J.A. 32). Petitioner drove off "after he saw that [Johnson] had it" (J.A. 32). Johnson later delivered the heroin to Scott (J.A. 32).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 2–3, 17–20) that the evidence was insufficient to support his conviction. Johnson testified that he obtained from petitioner the narcotics which he later gave to Scott. The facts that Johnson had a prior criminal record, smoked marihuana cigarettes occasionally, engaged in narcotic activities during 1961, and received money from the Bureau of Narcotics after he had agreed to co-operate with the government were matters for the jury to weigh in passing on his credibility. *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853; *Ware* v. *United States*,

259 F. 2d 442, 445 (C.A. 8); *United States* v. *Coduto*, 284 F. 2d 464, 466 (C.A. 7), certiorari denied, 365 U.S. 881. The additional circumstance that Johnson's identification of petitioner as the source of the narcotics was uncorroborated does not invalidate the conviction. *Caminetti* v. *United States*, 242 U.S. 470, 495; *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959; *White* v. *United States*, 315 F. 2d 113 (C.A. 9).

2. In its charge, the court instructed that Johnson was an accomplice whose testimony "should be received with caution and scrutinized with care"; that the jury was at liberty to accord the testimony such weight and credit as it chose; and that the jury might "as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice," but that it should do so only after it had "carefully and cautiously scrutinized such testimony" (J.A. 186). These instructions were correct. *Caminetti* v. *United States*, 242 U.S. 470, 495; *Holmgren* v. *United States*, 217 U.S. 509, 523–524; *Fletcher* v. *United States*, 158 F. 2d 321, 322 (C.A. D.C.).

After instructing on factors which might permissibly be considered in determining the credibility of witnesses generally (J.A. 185–186), the court charged that, in determining the credibility of Johnson, the jury *might* consider his criminal record; that it *might* also consider the possibility that Johnson believed he would benefit personally from testifying for the government in the case; and that it *might* consider whether any witness who was a paid informer colored his testimony in any way by reason of such employment

(J.A. 187–188). The court was not required, as petitioner contends, to use the words "must" or "should" instead of the word "might" in enumerating the considerations affecting Johnson's credibility. Cf. *Welch v. Tennessee Valley Authority*, 108 F. 2d 95, 101 (C.A. 6), certiorari denied, 309 U.S. 688; *Shelton v. United States*, 169 F. 2d 665, 667 (C.A. D.C.), certiorari denied, 335 U.S. 834; *United States v. Foster*, 9 F.R.D. 367, 388–389 (S.D. N.Y.).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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